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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 18, 2002

COMMONWEALTH OF VIRGINIA

At the relation of the CASE NO. PUE020174

STATE CORPORATION COMMISSION

Ex Parte: In the matter concerning
the aggregation of retail electric customers
under the provisions of the
Virginia Electric Utility Restructuring Act

ORDER ESTABLISHING INVESTIGATION

The Virginia Electric Utility Restructuring Act ("Restructuring Act" or "Act"), Chapter 23 (§ 56-576 et seq.) of Title 56 of the Code of Virginia authorizes the provision of aggregation services for the Commonwealth's retail electricity customers. An aggregator, as defined in the Act, is a person who acts as an agent or intermediary in connection with the purchase and sale of electricity to two or more retail electricity customers.[1] Section 56-588 of the Act requires the licensure of aggregators, and § 56-589 prescribes the circumstances in which the Commonwealth's localities may aggregate the loads of electric customers within their

[1] As set forth in § 56-576 of the Restructuring Act, "'Aggregator' means a person that, as an agent or intermediary, (i) offers to purchase, or purchases, electric energy or (ii) offers to arrange for, or arranges for, the purchase of electric energy, for sale to, or on behalf of, two or more retail customers not controlled by or under common control with such person. The following activities shall not, in and of themselves, make a person an aggregator under this chapter: (i) furnishing legal services to two or more retail customers, suppliers or aggregators; (ii) furnishing educational, informational, or analytical services to two or more retail customers, unless direct or indirect compensation for such services is paid by an aggregator or supplier of electric energy; (iii) furnishing educational, informational, or analytical services to two or more suppliers or aggregators; (iv) providing default service under § 56-585; (v) engaging in activities of a retail electric energy supplier, licensed pursuant to § 56-587, which are authorized by such supplier's license; and (vi) engaging in actions of a retail customer, in common with one or more other such retail customers, to issue a request for proposal or to negotiate a purchase of electric energy for consumption by such retail customers."

boundaries. Inter-locality aggregation and aggregation by the agencies of the Commonwealth are also described in § 56-589.

As directed by this Commission's Order concerning the phase-in of retail competition for electric generation promulgated in accordance with § 56-577 of the Act,[2] the Commonwealth's transition to retail generation choice began on January 1, 2002. With the exception of Virginia's electric cooperatives and Kentucky Utilities (d/b/a Old Dominion Power), all of Virginia's incumbent electric utilities will complete their phase-ins to retail choice by January 1, 2003. The remainder must be phased in not later than January 1, 2004. Consequently, determining the implementation of critical details, including the licensure and required oversight of persons engaged in aggregation activities, is extremely important.

Licensing

One key issue with respect to aggregation is determining which persons or entities must be licensed as aggregators. That question, in turn, is directly linked to the definition of "aggregator" set forth in § 56-576 of the Act. Notably, that definition was substantially amended by legislation passed by the 2000 Session of the Virginia General Assembly to carve out activities that "in and of themselves" would not constitute aggregation.[3] The amendatory language effectively establishes presumptions against an obligation to obtain licensure for persons engaged in certain activities, including educational, professional, and informational activities related to retail sales of generation services.[4]

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[2] Commonwealth of Virginia, ex rel. State Corporation Commission ex parte: In the matter concerning a draft plan for phase in of retail competition, Case No. PUE000740 (Commission Order dated March 30, 2001).

[3] Chapter 991 of the 2000 Acts of the Virginia General Assembly.

[4] Although it is equally clear that the use of the phrase "in and of themselves" indicates that the presumption can be overcome if any person engages in activities that do constitute aggregation within the actual definition, i.e., "(i) offers to purchase, or purchases, electric energy or (ii) offers to arrange for, or arranges for, the purchase of

These presumptions or "safe harbors" in clauses (i) through (iii) of the Act's definition of "aggregator" are easy enough to apply with respect to the simple acts of providing, without more, legal, educational, informational, or analytical services to retail customers, aggregators or suppliers.[5] Clauses (iv) and (v) effectively exempt from the definition's operation those persons serving as default suppliers under § 56-585 of the Act, or as suppliers of generation when licensed under § 56-587.

It is the remaining presumption in clause (vi) that introduces the most complexity in its application. This clause provides, in pertinent part, that "engaging in actions of a retail customer, in common with one or more other such retail customers, to issue a request for proposal or to negotiate a purchase of electric energy for consumption by such retail customers" does not in and of itself require licensing as an aggregator under the Act.

It seems likely that a group of residential customers could act in concert under the terms of clause (vi) to market their combined electric load to a competitive supplier without the necessity of obtaining an aggregation license. Such customers satisfy the principal criteria for this safe harbor's coverage by acting as retail customers in common with similar electric customers to obtain electric energy for their own consumption.

However, it would appear that the reach of clause (vi)'s presumption against licensing may be broader than a handful of residential customers, or even a property owners association. A group of industrial customers purchasing power for their own use might also fall within this exemption. Likewise, a trade association comprised of these industrial customers and nominally

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electric energy, for sale to, or on behalf of, two or more retail customers not controlled by or under common control with such person."

[5] Although the General Assembly added a twist to this presumption by stating in the definition's clause (ii), that if persons providing educational, informational, or analytical services to retail customers are also receiving compensation from aggregators of suppliers, this safe harbor is not applicable to such persons.

representing such customers in their efforts to market their electrical load might similarly be exempt from licensure.

The outer boundaries of the clause (vi) presumption, however, are not detailed in the definition of "aggregator" or anywhere else in the Restructuring Act, leaving several key practical questions to be addressed. For example, does clause (vi) effectively exempt from licensing collective electricity purchasing programs offered to the members of religious or other not-for-profit organizations, for-profit buying clubs, or senior citizens organizations? It is these questions that may have to be answered as retail choice is phased in.

A closely related issue concerns the potential obligation to obtain aggregator licensing of any membership organization that enters into marketing arrangements with suppliers or aggregators. Specifically, if such an arrangement provides a supplier or aggregator access to an organization's members or membership data in exchange for compensation by the supplier or aggregator to that organization, should that organization be licensed as an aggregator because of its "intermediary" role in bringing together suppliers and customers in a retail generation transaction? The same question is generated when such an organization endorses a supplier or aggregator's offerings, and receives compensation in exchange for that endorsement. Whether any such marketing arrangement would or should require the organization to be licensed as an aggregator is not addressed directly by the Act's provisions.

Other issues:

Other important issues on this topic relate to the terms and conditions of aggregation relationships. Should, for example, some limitations be placed on the length of aggregation contracts, or restrictions imposed on provisions for liquidated damages? Also, should

aggregation contract cancellation rights be further clarified?[6] Aggregation activities by affiliates of incumbent electric utilities raise additional questions about the potential impact of such activities on the development of effective competition within incumbent utilities' service territories.

Because retail customer aggregation may be very important to the development of effective competition for electric generation services in the Commonwealth, we have initiated this proceeding to further assist us in developing and refining appropriate policies, rules and regulations applicable thereto. As outlined above, we believe that inquiry is warranted in three categories: (i) licensing of aggregators, (ii) contractual relationships between aggregators and their customers (and also as between aggregators and suppliers or other aggregators), and (iii) the impact of incumbent electric utilities' relationships with their aggregator affiliates on the development of effective competition within the Commonwealth.

We will thus direct the Commission Staff to reconvene the work group from the proceeding that developed proposed rules governing retail access to competitive energy services.[7] Such working group may, however, be enlarged to accommodate other parties interested in the issues that are the subject of this investigation. In that vein, persons interested in participating in such working group should contact David Eichenlaub in the Commission's Division of Economics and Finance by e-mail at deichenlaub@scc.state.va.us or by telephone at (804) 371-9295. The Staff and the work group will focus on the aggregation issues outlined

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[6] Under the rules governing retail access adopted by this Commission, consumers may cancel an aggregation contract within 10 days of its execution (20 VAC 5-312-70 C 8). There are currently no provisions in these rules limiting the terms of aggregation contracts, or placing any restrictions on liquidated damages due and payable to an aggregator in the event of cancellation or breach. The general terms and conditions of any such contract must be disclosed under these rules, however.

[7] Commonwealth ex rel. State Corporation Commission, Ex Parte: In the matter of establishing rules for retail access, Case No. PUE010013 (Commission Order adopting rules entered on June 19, 2001).

above, as well as any others identified in the course of that dialogue. We will further direct the Staff to file a report concerning the work group's activities together with any proposed rules or other recommendations relating thereto.

Accordingly, IT IS ORDERED THAT:

(1) The Commission Staff shall conduct an investigation with respect to further refinement of the Commission's rules concerning aggregation, with input from a working group as set forth in this Order.

(2) On or before August 1, 2002, the Commission Staff shall file with the Clerk of the Commission, an original and fifteen (15) copies of a Staff report detailing the results of the aforesaid investigation, together with the provisions of any proposed rules concerning retail customer aggregation as may be proposed by the Staff. The Staff shall concurrently serve one (1) copy of such report, including any proposed rules, on all work group participants.